SIME DARBY ENERGY SOLUTION SDN BHD v. RZH SETIA JAYA SDN BHD

COURT OF APPEAL, PUTRAJAYA
NOR BEE ARIFFIN JCA
AZIZAH NAWAWI JCA
GUNALAN MUNIANDY JCA
[CIVIL APPEAL NO: B-02(NCC)(A)-695-06-2020]
6 AUGUST 2021

CONSTRUCTION LAW: *Adjudication – Decision – Claim for unpaid sum by subcontractor against main contractor – Adjudicator decided in favour of subcontractor – Enforcement of adjudication decision – Whether subcontractor entitled to admitted debt – Whether there was bona fide dispute on debt – Financial capacity of main contractor to pay debt – Construction Industry Payment and Adjudication Act 2012*

CIVIL PROCEDURE: *Injunction – Fortuna injunction – Application for Fortuna injunction to restrain filing of winding up petition – Claim for unpaid sum by subcontractor against main contractor – Adjudicator decided in favour of subcontractor – Enforcement of adjudication decision – Subcontractor served statutory notice pursuant to s. 466(1)(a) of Companies Act 2016 – Whether injunction ought to be granted – Whether winding-up petition stood chance to succeed – Whether was bona fide dispute of debt – Whether presentation of winding-up petition might produce irreparable damage – Whether Fortuna injunction abuse of court process – Whether main contractor acted timeously in applying for injunction*

The respondent, the main contractor for the construction works at the Melaka river, had appointed the appellant as a subcontractor. The appellant commenced adjudication proceedings against the respondent, under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'), claiming for a total sum of RM3,483,025.06. The respondent argued that, although there was an unpaid amount of RM1,255,794.63 and a variation of RM80,631.76, the claims were disputed because there was a delay of 535 days in the appellant's completion of the subcontract works, and after a set-off and cross-claim of RM5,180,000 as liquidated and ascertained damages ('LAD'), there was no amount payable to the appellant. The adjudicator decided in favour of the appellant, in the amount of RM1,806,538.76 ('adjudication decision'). The appellant applied, at the High Court, to register the adjudication decision as a court judgment and for the enforcement of the same. The respondent contested the enforcement suit and took steps to refer the dispute to arbitration before filing originating summons ('OS') to set aside the adjudication decision. Having been served with a statutory notice ('notice') by the appellant, pursuant to s. 466(1)(a) of the Companies Act 2016 ('Act'), demanding for RM1,806,538.76, the respondent filed an OS for an injunction to restrain the appellant from filing/continuing any winding-

A up petition against the respondent based on the notice. The High Court granted the respondent's application for interim injunction. The respondent later filed to stay the decision pending the arbitration on 4 June 2020. The respondent informed the Judicial Commissioner ('JC') that it had initiated arbitration proceedings at the Asian International Arbitration Centre
B ('AIAC') for its LAD claim against the appellant. The JC decided that (i) an injunction be granted to restrain the appellant from filing a winding-up petition against the respondent based on the notice; and (ii) the appellant was not entitled to be paid the admitted debt as the respondent had a *bona fide* claim for LAD against the appellant. Hence, the present appeal. In support
C of its appeal, the appellant submitted that: (i) there was no *bona fide* dispute on the debt as the respondent admitted the debt owing in the sum of RM1,464,603.39 by way of written payment response; (ii) the grant of the *Fortuna* injunction was an abuse of court process; and (iii) the respondent did not have the financial capacity to pay the debt; the respondent only exhibited its audited accounts up to 2017 and not exhibit its latest audited accounts or
D bank statements.

Held (allowing appeal with costs):
Per Gunalan Muniandy JCA delivering the judgment of the court:

(1) The JC failed to ask for proof from the respondent that they had
E commenced an action in court or, at least, the AIAC for the purported LAD claim prior to the OS but went on to hold that the LAD claim had merits. The JC failed to note that the respondent had made a bare allegation that arbitration proceedings had been commenced for the claim. The said proceeding was only begun on 10 June 2020 as the
F notice of arbitration was only received by the appellant on that day while the notification to the AIAC was only on 11 June 2020. As at 4 June 2020, no arbitration proceedings had been commenced at the AIAC and neither was any notice of arbitration exhibited in any of the respondent's affidavit in the OS seeking the *Fortuna* injunction.
G Furthermore, the JC did not accede to the appellant's application that the admitted debt be deposited in court as security as a condition for the injunction being ordered. (paras 22 & 23)

(2) By virtue of s. 466(1) of the Act, as the statutory notice had been served on the respondent and there was no settlement of the debt claim, the
H respondent would be deemed to be incapable of settling its debts. However, the JC appeared to have disregarded these issues in arriving at the decision to grant the *Fortuna* injunction despite it being an important consideration as to the financial capacity of the respondent to settle the adjudication decision. Even if a company is shown to be
I solvent but it is indebted to a creditor, as in this case, simple refusal to pay upon service of the notice could not justify the granting of an order legitimately restraining the commencement of a winding up petition. (paras 25 & 28)

(3) The JC was of the view the appellant was not entitled to be paid the admitted debt as the respondent had a *bona fide* claim for LAD against the appellant, for which there was no proceeding in court of the AIAC as at 4 June 2020. This was an erroneous view in principle because the purported existence of the LAD claim that was one of the important factors that led to the JC granting the *Fortuna* injunction whereas it was premature to consider the same *bona fide*. (para 29)

(4) The conduct of a party moving the court for an injunction is a material and vital factor in the determination of whether the injunction sought ought to be allowed. The applicant must act timeously to protect his right. The notices of application filed by the respondent, *ie*, to set aside the adjudication decision and to stay the execution of the adjudication decision, were filed on 12 December 2019, 14 days following receipt of the adjudication decision. The respondent's notice of arbitration was served on the appellant only on 11 June 2020 which was more than seven months after the receipt of the adjudication decision. This conduct was not consistent with the respondent's stance that they would suffer irreparable loss should an injunction not be granted to restrain enforcement of the adjudication decision or the presentation of a winding-up petition. (paras 33, 35 & 36)

(5) Until and unless the adjudication was set aside, it could, in law, form the basis for the statutory notice which was the position in the present instance. Whether or not the respondent had a *bona fide* cross-claim against the appellant on merits to challenge the petition was a matter to be adjudged by the winding-up court. An unproven cross-claim could not be the basis for restraining the filing of a winding-up petition based on a valid and enforceable adjudication decision. (para 50)

(6) The Companies Commission of Malaysia search done by the appellant on the respondent's financial standing showed that there were only audited accounts up to the year ending 31 December 2018 where the 'profit after tax' was only to the extent of RM219,334. As such, the respondent certainly did not have the means or capability to settle the judgment debt. (para 52)

(7) The overall conduct of the respondent, and the grounds advanced in seeking the *Fortuna* injunction pointed to their intention to delay settlement of the judgment debt which was not presently within their means and were not *bona fide* to protect their rights. Before concluding that the appellant was entitled to a *Fortuna* injunction, the JC failed to pay heed to established principles of the grant of the same. The JC further failed to strictly apply the principle expressly pronounced in *Likas Bay Precinct Sdn Bhd v. Bina Puri Sdn Bhd* on the basic premise of the respondent, as the losing party, in the adjudication proceeding to pursue court action or arbitration that may eventually prevail over or

reverse the adjudication decision. This was an uncertain event that should not be used to preclude the statutory right of the appellant to pursue a winding-up action. (paras 54, 58 & 59)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Case [2015] 1 LNS 756 HC ***(refd)***

ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd [2020] MLJU 282 ***(refd)***

Bina Puri Construction Sdn Bhd v. Capriform Builders Sdn Bhd [2020] 1 LNS 50 HC ***(refd)***

Cookson v. Knowles [1979] AC 556 ***(refd)***

Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83 ***(refd)***

Ibai Golf & Country Club Bhd v. Laman Kejora Sdn Bhd [2019] 1 LNS 246 HC ***(refd)***

Karisma Synergy Sdn Bhd v. Gates PCM Construction (M) Sdn Bhd [2019] 1 CLJ 122 HC ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Likas Bay Precinct Sdn Bhd v. Bina Puri Sdn Bhd [2019] 3 CLJ 499 CA ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433 FC ***(refd)***

Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***

Uda Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor and Another Case [2015] 5 CLJ 527 HC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 466(1)(a)

Construction Industry Payment and Adjudication Act 2012, ss. 13, 28(3), 29, 30, 31

Rules of Court 2012, O. 45, 46, 47, 48, 49, 50, 51

For the appellant - Vijayalatha P Velupillai; M/s Velupillai & Assocs

For the respondent - Kelvin Ng Chun Yee & Eric Chan See Quan; M/s Vin & Isaac Lee

[Editor's note: For the High Court judgment, please see RZH Setia Jaya Sdn Bhd v. Sime Darby Energy Solutions Sdn Bhd [2020] 1 LNS 889 (overruled).]

Reported by Najib Tamby

JUDGMENT

Gunalan Muniandy JCA:

Introduction

[1] This is an appeal by the appellant/defendant against the decision of the learned Judicial Commissioner ("LJC") dated 4 June 2020 in granting an injunction to restrain the appellant from filing a winding-up petition against the respondent/plaintiff based on 31 December 2016 statutory notice.

Background Facts

[2] The respondent was the main contractor appointed by Jabatan Pengairan dan Saliran Malaysia to execute construction works for a project at the Melaka River. In turn, the respondent appointed the appellant as a subcontractor to execute certain parts of the works.

[3] The appellant commenced adjudication proceedings against the respondent under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA 2012"). The appellant claims to a total amount of RM3,483,025.06 comprising:

(i) Balance of certified claim nos. 1 to 16;

(ii) Non-certified progress claim nos. 17 and 18;

(iii) Revised progress claim no. 19;

(iv) Variation order;

(v) Remeasurement works and other miscellaneous items.

[4] In the adjudication, the respondent contended that although there was an unpaid certified amount of RM1,255,794.63 and variation of RM80,631.76, the claims were disputed because there was delay of 535 days in the appellant's completion of the subcontract works, and after a set-off and cross-claim of RM5,180,000 as liquidated and ascertained damages ("LAD"), there was no amount payable to the appellant.

[5] The adjudicator delivered his adjudication decision dated 31 October 2019 in favour of the appellant in the amount of RM1,806,538.76 under the said adjudication decision ("AD").

[6] In November 2019, the appellant commenced Shah Alam High Court Originating Summons No. BA-24C(ARB)-8-11-2019 applying for registration of the said AD as a court judgment and for enforcement of the same. The respondent had filed its affidavit in reply dated 13 December 2019 to contest the enforcement suit. The respondent had also taken steps to refer the dispute to arbitration. On 12 December 2019, the respondent filed an originating summons to set aside the said AD.

[7] On 3 January 2020, the respondent was served with a notice dated 31 December 2019, described by the appellant as a statutory notice under s. 466(1)(a) of the Companies Act 2016, demanding for RM1,806,538.76 being:

(i) RM48,765.24 as reimbursement of security paid in advance for the adjudication; and

(ii) RM1,782,156.14 as adjudication sum awarded by the adjudicator in the said AD.

[8] The respondent filed an originating summons for an injunction to restrain the appellant from filing or continuing any winding-up petition against the respondent based on the notice dated 31 December 2016.

[9] On 22 January 2020, the High Court Judge granted an *ex parte* interim injunction to restrain the appellant from filing any winding-up petition.

[10] In April 2020, the respondent also filed Originating Summons No. BA-24C-32-04-2020 to stay the adjudication decision pending the arbitration.

Findings Of The High Court

[11] On 4 June 2020, the LJC decided that an injunction be granted to restrain the appellant from filing a winding-up petition against the respondent based on the 31 December 2016 notice.

[12] The LJC held that consistent with CIPAA's objective, it is appropriate for the beneficiary of a CIPAA adjudication decision to resort to ss. 28 to 31 of CIPAA 2012 by applying to the court for registration of the adjudication decision as a court judgment and thereafter enforce the court judgment for recovery of money according to one or more modes of execution of judgment under O. 45 to 51 of the Rules of Court 2012. Such modes of execution of judgments are more compatible with the CIPAA 2012's objective of facilitating cashflows for contractors and service providers in the construction industry.

[13] A just and equitable balance has to be struck between the rights of a successful litigant in adjudication proceedings in collecting his cashflow expeditiously pursuant to ss. 28 to 31 of CIPAA and the rights of the loser in adjudication proceedings to pursue arbitration or court action for a final decision which may overturn or prevail over the provisionally binding adjudication decision. It is meant to treat the adjudication decision as disputable in the context of court proceedings relating to winding up so that in suitable cases where there is *bona fide* substantial dispute of debt the court may issue *Fortuna* injunction to restrain the drastic or extreme measure of resorting to winding up while preserving the statutory rights and remedies of the successful litigants in adjudication proceedings to recover their monies as per the adjudication sums by way of the ordinary modes of execution in O. 45 to 51 of the Rules of Court 2012.

The Appellant's Submission

[14] Counsel for the appellant submitted that the respondent had admitted the debt owing in the sum of RM1,464,603.39 *vide* written payment response. Therefore, there is no *bona fide* dispute on the debt by the respondent. The grant of the present *Fortuna* injunction was an abuse of the court process.

[15] The respondent did not have the financial capacity or means to pay the debt. The respondent did not exhibit in the latest audited accounts or bank statement. The respondent only exhibited the audited accounts up to the year 2017.

The Respondents' Submission

[16] The respondent's submission can be summarised as follows:

(i) The learned High Court Judge had rightly determined that there was a *bona fide* dispute of the debt.

(ii) There is no requirement that the arbitration must be commenced by the hearing of the originating summons. It must be borne in mind that the dispute is genuine and had been raised even as early as in the CIPAA adjudication proceeding itself.

(iii) Just because the audited statement of accounts is not up to date doesn't automatically mean that the respondent is insolvent.

Our Decision

[17] We would start our analysis by looking at the basic premise of the LJC's decision that in considering the exercise of his discretion whether or not to grant a *Fortuna* injunction in this case, the judge has to also bear in mind the need to preserve the defendant's right to enforce the court judgment which it would probably obtain upon registration of the adjudication decision as a court judgment; the statutory right which s. 28(3) of CIPAA 2012 has provided and also the principles on the exercise of discretion which the House of Lords enunciated in the following words: If there are no statutory guidelines and the appellate court lays down certain guidelines for the exercise of discretion, the trial judge is not precluded from departing where special circumstances exist in a particular case: *Cookson v. Knowles* [1979] AC 556 (headnote), House of Lords, England.

[18] The LJC then went on to hold that he had exercised his discretion to grant the *Fortuna* injunction ("FI") as per the terms of the order dated 4 June 2020 ("the order") in the light of the totality of facts and circumstances of the case before him.

[19] Importantly, the LJC had accepted as settled that an adjudication decision as disputable in the context of the law of winding-up is also consistent with the principle enunciated by our courts that winding-up of a company should be a remedy of the last resort. We concur with the LJC's view that a just and equitable balance ought to be struck between the rights of a successful litigant in adjudication proceeding in collecting his cashflow expeditiously pursuant to ss. 28 to 31 of CIPAA and the rights of the loser in adjudication proceeding to pursue arbitration or court action for a final decision.

[20] However, the point of contention in this appeal is whether the LJC was right in his view that as the final decision by the High Court or the arbitrator may overturn or prevail over the provisionally binding AD, the AD should be considered disputable in the context of winding-up proceedings to enforce the debt arising from the AD. Hence, where appropriate, it was contended that the debt should be considered a *bona fide* substantially disputed debt that would warrant a FI being granted to restrain resort to the drastic step of winding-up proceedings. According to the LJC, it would not have the effect of preventing the successful litigant's statutory

A rights and remedies to recover their moneys in the adjudication by recourse to ordinary modes of execution pursuant to O. 45 to 51 of the Rules of Court 2012 ("ROC").

[21] It was also impressed upon us by the defendant that the plaintiff had admitted an amount owing of RM1,464,603 but the LJC agreed with the B plaintiff's submission that there was no admission of debt as such and found that in the factual context of the case, the plaintiff had confirmed there was an unpaid certified amount of RM1,255,794.63 and a variation amounting to RM80,631.76, but the plaintiff had denied any liability to pay any amount to the defendant. Instead, the plaintiff's position was that after the set-off C against the liquidated and ascertained damages ("LAD") which the plaintiff had against the defendant, there should be a net amount payable by the defendant to the plaintiff. Further, that the plaintiff acted with reasonable promptitude in filing the application to set aside the AD and the filing was done before the statutory notice was issued. There was, therefore, in his D finding, no undue delay which warrant the court to decline its discretion, nor to infer a clear passivity indicative of mere afterthought. Based on the totality of the facts and circumstances of the present case as alluded to by the LJC in his judgment, he concluded that the court's discretion should be exercised in favour of granting the FI prayed for by the plaintiff. In his view, the E debtor's rights and remedies under CIPAA 2012 were preserved to execute the court judgment which could be procured upon registration of the AD in court through the normal modes of execution under the ROC.

[22] An important fact brought to our attention was that when the parties appeared before the LJC on 4 June 2020, the respondent's counsel had F informed the LJC that the respondent had initiated arbitration proceedings at the AIAC for its LAD claim against the appellant. However, it was shown to us that the said proceeding was only begun on 10 June 2020 as the notice of arbitration was only received by the appellant on that day whereas the notification to the AIAC was only on 11 June 2020 in accordance with G art. 3 of the AIAC Arbitration Rules 2018. Importantly, as at 4 June 2020, no arbitration proceeding had been commenced at the AIAC and neither was any notice of arbitration exhibited in any of the respondent's affidavit in the originating summons ("OS") seeking the FI.

[23] The LJC appears to have failed to ask for proof from the respondent H that they had commenced an action in court or at the AIAC for the purported LAD claim prior to the OS but went on to hold that the LAD claim had merits. He, however, failed to note that the respondent had made a bare allegation that arbitration proceedings had been commenced for this claim. Neither did the LJC accede to the appellant's application that the aforesaid I admitted debt be deposited in court as security as a condition for the injunction being ordered.

[24] Another factor raised by the appellant to oppose the present OS was that at the time of the adjudication proceeding when the said OS was commenced, the appellant had yet to file a winding-up petition as the 21-day notice had not expired. As such, that appellant's contention which we found had basis was that the OS was premature, defective and an abuse of process of the court. It was grounded on the well-settled principle that a winding-up proceeding was not a proceeding for the execution of a judgment and as such, s. 13 of the CIPAA would not apply.

[25] By virtue of s. 466(1) of the Companies Act 2016 ("CA"), as the statutory notice had been served on the respondent under s. 466(1)(a) of the CA and there was no settlement of the debt claimed, the respondent would be deemed to be incapable of settling its debts. However, the LJC appears to have disregarded this issue in arriving at his decision to grant the FI despite it being an important consideration as to the financial capacity of the respondent to settle the AD.

[26] In essence, the question for our determination primarily was whether the FI granted to the respondent was premised on an application that was frivolous, unnecessary, a waste of time and had caused costs to be incurred by the appellant as the successful party in the adjudication proceeding. To be noted is that on the date of hearing on 4 June 2020, the respondent had not provided particulars of a *bona fide* triable cause of action against the appellant but was content to merely rely on general statements in its grounds in support of the OS. In this regard, on that date, the respondent had yet to issue any letter of demand ("LOD") or notice to the appellant for any claim. It warrants reiteration that neither had any writ action in court or arbitration been commenced as at 4 June 2020.

[27] Therefore, on the facts, it is apparent that the respondent's assertion of a cross-claim against the appellant for LAD which was the very basis of the purported *bona fide* dispute of debt raised by the respondent was plainly not established. Hence, the LJC's finding to the contrary to justify the grant of the FI appears to us to be flawed.

[28] We agree with the appellant's position that in principle, even if a company is shown to be solvent but it is indebted to a creditor as in this case, simple refusal to pay upon service of the s. 466(1)(a) notice cannot ordinarily justify the granting of an order legitimately restraining the commencement of a winding-up petition.

[29] Central to the appellant's opposition to the respondent's OS is the respondent's admission of a debt due to the appellant in the sum of RM1,463,603.39 as evidenced by the respondent's payment response dated 24 May 2019 to the notice of adjudication. However, the LJC held the view that the appellant was not entitled to be paid this sum as the respondent had a *bona fide* claim for LAD against the appellant for which there was no proceeding in court or the AIAC as at 4 June 2020. We are in agreement with

A the appellant that this is an erroneous view in principle because the purported existence of the LAD claim that is one of the important factors that led to the LJC granting the FI whereas it was premature to consider the same *bona fide.*

[30] We agreed with the decision of the High Court in the case that the appellant cited, *Uda Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor and* B *Another Case* [2015] 5 CLJ 527 as follows:

> [81] When served, a non-paying party responds to the payment claim by way of written "payment response". That "payment response" sets out either the admission or dispute of the amount claimed, whether in respect of the whole or part of the payment claim. Where there is admission, the C relevant amount is expected to be sent along with the payment response. Where there is dispute, the reasons for the dispute are required. There is a time period for the payment response (ten working days of the receipt of the payment claim); and a deeming provision where a non-paying party fails to respond to the payment claim. In such a case, that party is deemed to have disputed the entire payment claim (sub-s. 6(4)).

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[31] We accept that, in principle, a debt that has been admitted, cannot be considered a disputed debt based on which the grant of an injunction to restrain the presentation of a winding-up petition would be justified. Any application to grant the order under such circumstances should be regarded as an abuse of process of the court. (See *Ibai Golf & Country Club Bhd v. Laman* E *Kejora Sdn Bhd* [2019] 1 LNS 246).

[32] We concur with the judgment of the case in *Karisma Synergy Sdn Bhd v. Gates PCM Construction (M) Sdn Bhd* [2019] 1 CLJ 122 where the law on this point was succinctly stated as follows:

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> The solvency or otherwise of the respondent is in this context of little relevance. Once the debt is shown not to be *bona fide* disputed on substantial grounds, and the presumption of insolvency unrebutted, even if the respondent could show that it was actually solvent, its refusal to pay up would still entitle the petitioner to pursue the winding up of the respondent.

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> A neglect to payment in the first place triggers the statutory presumption under s. 466(1)(a). The question then turns on whether the respondent debtor can show it is not insolvent in order to rebut the presumption. But even if the presumption is rebutted, a continued refusal cannot deny the right of a creditor to file a winding up petition against a debtor.

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[33] It is settled law that the conduct of a party moving the court for an injunction is a material and vital factor in the determination of whether the injunction sought ought to be allowed. The applicant must act timeously to protect his rights.

I **[34]** In *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 the Court of Appeal per Gopal Sri Ram JCA (as he then was) remarked that:

> It is cardinal principle of law, that when a litigant seeks the intervention of the Court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus*, *jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a Court may refuse relief to an indolent litigant.

[35] We have paid attention to the sequence of events preceding the present OS for a FI. *Inter alia*, the two notices of application filed by the respondent: to set aside the AD dated 31 October 2019 and to stay the execution of the AD were filed only on 12 December 2019, ie, 14 days following receipt of the AD. More importantly, the respondent's notice of arbitration was served on the appellant only on 11 June 2020, which was more than seven months after the receipt of the AD.

[36] In our considered view, this is not a conduct that is consistent with the respondent's stance that they would suffer irreparable loss should an injunction not be granted to restrain enforcement of the AD or the presentation of a winding-up petition. On this issue, we do not agree with the LJC's view that the aforesaid delays are irrelevant because there are no deadlines stipulated for the filing of the above notices of application. This view is wrong in principle as a party seeking an injunction or a stay of execution must act timeously.

[37] The respondent is correct in stating that the principle which the court has to decide whether to grant a *Fortuna* injunction is laid out in *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83. Also, that the principle of this case has been applied in many cases in Malaysia, notably in the Court of Appeal case of *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316.

[38] The following passages from the judgment in *Mobikom* (*supra*) are relevant in the determination of this appeal:

> [4] There is no doubt that a court has jurisdiction and power to grant an anti-suit injunction whenever the interest of justice call for or demand it. So an injunction may be issued by our courts to restrain the institution or prosecution of a suit in a foreign jurisdiction where this would lead to a multiplicity of proceedings. See, *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors* [2000] 2 CLJ 197. Similarly, a party may be restrained from presenting a winding up petition if it found, for example, that there is a *bona fide* dispute about the debt on which the notice of demand issued under s. 218 of the Companies Act is based. See, *Bina Satu Sdn Bhd v. Tan Construction* [1988] 1 MLJ 533; *Stonegate Securities Ltd v. Gregory* [1980] 1 Ch 576. Once the debt on which the proposed petition is based is *bona fide* disputed it matters not that the debtor company is in fact insolvent. See, *Mann v. Goldstein* [1968] 2 All ER 769.

A [5] The kind of injunction by which an intended winding up petition is sought to be restrained is known as a "*Fortuna* injunction" taking its name from the case in which the juridical basis for the relief was first explained. (See *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83). In that case, McGarvie J discussed the basis on which a court acts to restrain the presentation of a winding up petition and the two branches
B of the principle that guide courts in the grant of an injunction. In respect of the basis, his Honour said this:

> When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process. *Mann v. Goldstein* [1968] 1 WLR 1091, at pp.
C 1093-4; [1968] 2 All ER 769. Usually a court acts against abuse of its process after proceedings have been commenced. Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in the proceedings may be struck out. This is done to relieve a party to the proceedings from an oppressive and damaging situation in which he has been placed through abuse of court
D process.

[39] As to whether a successful party in an adjudication proceeding is entitled to present a winding-up petition, the law is now settled with the advent of the Court of Appeal decision in *Likas Bay Precinct Sdn Bhd v. Bina Puri Sdn Bhd* [2019] 3 CLJ 499; [2019] 3 MLJ 244, it was held that one may
E proceed to wind up a company based on an adjudication decision under CIPAA, even without having to first apply to enforce the same under s. 28 of CIPAA.

[40] In the above case, the appellant Likas Bay had objected to the
F presentation of the winding-up petition claiming that they had a *bona fide* disputed debt for these reasons:

(i) Bina Puri had not applied for the adjudication decision to be enforced under s. 28 of CIPAA;

(ii) That the statutory notice was defective because the adjudication decision
G ordered the monies to be paid to KLRCA and not the petitioner; and

(iii) Likas Bay was expecting progress payment to be paid for a separate project and as such, it was not just and equitable for them to be wound up.

H **[41]** However, the High Court and COA found that there was no disputed debt and ordered the winding up of the company because Likas Bay's objection was neither on merits nor substantial ground.

[42] The respondent, on the other hand, placed much reliance on the judgment of the High Court in *ASM Development (KL) Sdn Bhd v. Econpile (M)*
I *Sdn Bhd* [2020] MLJU 282 which distinguished the principle in *Likas Bay* or the facts. In this case, the High Court restrained Econpile from winding up ASM based on an adjudication decision.

[43] In summarising the judgment in *ASM Development*, the appellant who considered it to be the thrust of its case, stated as follows: A

> In deciding such, the Learned Judge (as his Lordship was formerly known) considered the nature and effect of an adjudication decision as provided under CIPAA. In this respect, among others:
>
> (a) S28 merely allows for an application to enforce an adjudication decision "as if it was a judgment or order" and not as a judgment of the high court. (The learned judge compares this against an arbitration award that is registered under the Arbitration Act 2005) Thus, CIPAA does not intend for an adjudication decision to have the same effect as a court judgment; B C
>
> (b) Whilst binding, s13 of CIPAA confers an adjudication decision only a "temporary finality" unless and until it is, among others, it is set aside or decided by arbitration or court;
>
> (c) This temporary finality means that, an unlike a judgment, an adjudication decision by its very nature can be disputed, as s. 13 of CIPAA clearly provides for the mechanism. D

[44] While accepting the principle in *Likas Bay* (*supra*) the learned judge held that just because s. 28 of CIPAA does not include the right to initiate winding-up proceedings, it does not bar one from presenting a winding-up petition based on the adjudication decision. All it means is that the presentation of a winding-up petition based upon an adjudication decision is E not a specific statutory right provided under CIPAA and is therefore subject to the general principles relating to abuse of the process of the court referred to in *Fortuna Holdings* and the cases cited.

[45] The learned judge then proceeded to grant the restraining order sought F by Econpile on the ground that, *inter alia*, even while the adjudication proceeding was afoot, both parties had served notices of arbitration on each other for their respective in the course of the project.

[46] In their conclusion, the respondent submitted that applying the principles enunciated in *ASM Development*'s (*supra*) in the case herein, the G learned High Court Judge in our case was correct in allowing the OS:

(i) The respondent has a *bona fide* dispute to the adjudicated sum supported with sufficient evidence;

(ii) The respondent disputes the debt based on substantial grounds;

(iii) The respondent has commenced arbitration to refer all these disputes for H a final determination;

(iv) The appellant ought to be restrained from presenting a winding-up petition until the dispute has been finally resolved at arbitration.

[47] With respect, we do not agree with the conclusion reached by the LJC I as, amongst others, the LJC had not accorded sufficient judicial appreciation to the settled principle enunciated in the *Likas Bay* case and the vital factors in the instant case that in our view, clearly did not favour the granting of a FI to restrain the appellant from filing a winding-up petition.

[48] It is important to bear in mind that the Court of Appeal in *Likas Bay* (*supra*) pronounced in no uncertain terms without qualification that a party who is armed with an AD in its favour would be entitled to present a winding-up petition based on the award.

[49] However, in *ASM Development* (*supra*) a contrary view was expressed that it does not mean the opposing party cannot challenge the petition or even the statutory notice. The debt under the adjudication decision can still be disputed and the court will have to decide whether it is so.

[50] With respect, to our minds, this does not equate to entitling the party ordered to make payment under the AD to an order to restrain the successful party from presenting a winding-up petition as the former has a statutory right to challenge the statutory notice or petition before the winding-up court. Until and unless the AD is set aside, it can in law form the basis for the statutory notice which was the position in the present instance. Whether or not the respondent had a *bona fide* cross-claim against the appellant on merits to challenge the petition is a matter to be adjudged by the winding-up court. We are not convinced that an unproven cross-claim can be the basis for restraining the filing of a winding-up petition based on a valid and enforceable AD.

[51] An important fact highlighted to us by the appellant was the respondent is an obviously insolvent entity and that their assertion was untrue that they were a solvent company and had the funds to settle the debt due under the AD to the appellant. It was stressed that till to date its current audited accounts and the monthly audited account for the year 2019 were not exhibited. What was exhibited was only the audited accounts up to the year 2017 which were about two years before the material time of the OS.

[52] It is also important for us to take cognisance of the Companies Commission of Malaysia ("CCM") search done by the appellant on the respondent's financial standing which showed that there were only audited accounts up to the year ending 31 December 2018 wherein the "profit after tax" was only to the extent of RM219,334. As such the respondent certainly did not have the means or capability to settle the judgment debt under the court order dated 13 October 2020 which ran into more than RM1.7 million not to mention interest at 5% per annum from the date of the AD until realisation.

[53] In our view, the purported negative impact on the respondent company should the winding-up petition be not restrained is a baseless ground raised by the respondent to avoid paying the above judgment debt considering that their financial status as exhibited in their affidavit in support was shown to be neither credible nor reliable. Instead, it reflected the respondent's insolvency and inability to pay the judgment debt.

[54] We are satisfied that, as correctly contended by the appellant, the overall conduct of the respondent and the grounds advanced in seeking the FI pointed to their intention to delay settlement of the said judgment debt which was not presently within their means and were not *bona fide* to protect their rights.

[55] Before concluding, we propose to highlight the objectives and legislative intent of CIPAA 2012 which revolve around speedy and efficient dispute resolution in the construction industry to safeguard the public interest. On this point, we concur with the view expressed by the learned judge in the High Court case of *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Case* [2015] 1 LNS 756 as follows:

> Operation and application of CIPAA
>
> 135. Having examined the provisions of CIPAA, appreciated Parliament's intention in respect of CIPAA, understood how other jurisdictions have dealt, with adjudication, the next step is to recognise the Act for what it is; and that it is an Act providing for a "speedy dispute resolution through adjudication." The dispute that needs speedy resolution must necessarily be a dispute over payment claims in construction contracts. The provisions in the Act regulate the whole process of adjudication and for matters connected and incidental to adjudication. All this serves the object of ensuring and facilitating "regular and timely payment in respect of construction contracts.

[56] Similarly, the Federal Court in discussing the legislative purpose of enacting the CIPAA, remarked emphatically in *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433 that:

> [53] When the High Court decided on both the enforcement and setting aside applications, the learned judge made the following observations:
>
> > [93] In all this debate we must not forget Parliament's intention in enacting CIPAA is to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters. The objective and purpose for CIPAA are to provide a solution to payment problems that stifles cash flow in the construction industry.

[57] Before us, having reviewed the authorities and principles relating to CIPAA's objectives and the parties' respective contentions, the central question was whether the LJC had failed to properly and sufficiently appreciate and understand the objectives of CIPAA in granting the FI in this case. We have given due regard to the fact that there was a genuine debt owing to the appellant based on an AD that was in law binding and enforceable, including by recourse to winding-up proceedings. The respondent was amply shown to be not capable of settling the judgment debt upon service of the s. 486 statutory notice.

[58] Our considered view is that before concluding that the appellant was entitled to a FI, the LJC had failed to pay heed to established principles for the grant of a FI. Suffice for us to refer to the case cited by the appellant, *Bina Puri Construction Sdn Bhd v. Capriform Builders Sdn Bhd* [2020] 1 LNS 50 which held that:

> 7. To be entitled to be granted a *Fortuna* Injunction, the Plaintiff must satisfy that:
>
> (a) the winding up petition intended by the Defendant has no chance of success whether as a matter of law or fact. This is also to say that there is a *bona fide* dispute of the debt on substantial ground so that presentation of the winding-up petition to enforce payment would amount to an abuse of the process of the Court.
>
> (b) The presentation of winding up petition intended by the Defendant might produce irreparable damage to the Plaintiff company. See: *Holdings PVT Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83; *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316, CA and *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947, CA.
>
> 20. As regards the case of *Malaysian Air Charter Company Sdn Bhd v. Petronas* [2000] 4 CLJ 437; [2000] 1 MLRA 649 (FC), … this case does not support the proposition that *Fortuna* Injunction should be granted to restrain the presentation of the winding-up petition against a company whenever it is established that it is solvent and yet it can continue in not paying its indisputable debt to its creditor.

Conclusion

[59] In the circumstances, our decision would be that the LJC had erred in principle in failing to consider or correctly apply established principles and criteria for the grant of a FI against the enforcement of a proven judgment debt based on an AD contrary to the object and intention of the CIPAA for expeditious payments of proven construction claims. In our view, the LJC was plainly wrong in failing to strictly apply the principle expressly pronounced in *Likas Bay* (*supra*) on the basic premise of the right of the respondent as the losing party in the adjudication proceeding to pursue court action or arbitration that may eventually prevail over or reverse the AD. This is an uncertain event that should not be used to preclude the statutory right of the appellant to pursue a winding-up action.

[60] Hence, our judgment is unanimous that there is merit in this appeal to warrant appellate intervention to rectify the error of the High Court in failing to exercise its discretionary powers correctly. The LJC had erroneously granted the *Fortuna* injunction. The appeal is hereby allowed with costs. Decision of the High Court dated 4 June 2020 is set aside. Costs of RM15,000 to the appellant here and below subject to payment of allocator.